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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHECKRITE LTD., INC.,

Petitioner,

v.

SHAROLYN CHARLES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Are collection efforts on a dishonored check an attempt to collect a "debt" as defined in the Fair Debt Collection Practices Act.

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STATEMENT OF THE CASE

On or about July 4, 1996, Sharolyn Charles wrote a check in the amount of $17.93 to Ponchos restaurant, for the purchase of a meal. Ms. Charles' bank dishonored the check for insufficient funds (Ms. Charles made a mistake in balancing her checkbook). Ponchos forwarded the check to CheckRite and asked it to pursue collection of the dishonored check. On or about July 19, 1995, CheckRite sent a letter to Ms. Charles requesting payment of the face amount of the check plus a $25.00 "service charge." On August 7, 1995, CheckRite sent another letter to Ms. Charles seeking payment.

After CheckRite failed in its collection efforts, CheckRite retained Alvin R. Lundgren of Lundgren & Associates, to continue collection efforts. On or about September 8, 1995, Lundgren sent a letter to Ms. Charles demanding payment of $127.93, consisting of the face amount of the dishonored check and a $110 "settlement amount." Immediately upon receipt of this letter, Ms. Charles forwarded a money order to Lundgren in the amount of $17.93, the full amount necessary for Ms. Charles to discharge her liability under Arizona law. Lundgren returned the money order to Ms. Charles and in several letters demanded full payment of the $127.93.

On October 19, 1995, Ms. Charles filed a class action complaint alleging that CheckRite and Lundgren violated various provisions of the Fair Debt Collection Practices Act ("FDCPA"). Shortly thereafter, CheckRite and Lundgren filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6), arguing that an attempt to collect a dishonored check did not constitute a debt under the FDCPA. On May 9, 1996, the United States District Court for the District of Arizona granted the motion.

Ms. Charles appealed to the United States Court of Appeals for the Ninth Circuit. On July 8, 1997, the Ninth Circuit reversed the District Court. In its opinion the court referred to *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997) and adopted the rationale of the Seventh Circuit. CheckRite filed a petition for rehearing, which was denied on August 8, 1997. CheckRite now petitions this Court to review the order of the Ninth Circuit pursuant to 28 U.S.C. § 2101(c).

SUMMARY OF REASONS FOR DENYING WRIT

The question presented to and decided by the Court below is whether a dishonored check constitutes a "debt" as defined by the FDCPA. The Ninth Circuit's holding in the affirmative is entirely consistent with the only other pronouncement by a federal Court of Appeals to address the same question, the decision of the Seventh Circuit whose reasoning the Court below adopted. There is no conflict among the Circuit Courts with regard to this question.

The purported conflict among the Circuits claimed in the Petition arises from unexamined dicta in an early decision from the Third Circuit. This dicta, engrafting a credit component onto the statutory definition of a "debt," has been repudiated by the three Circuit Courts which have reviewed it and has yet to be considered by the Third Circuit in light of its rejection by its sister courts. There is no holding from a Court of Appeals which conflicts with the holding below, and the Petition therefore presents no basis meeting the exacting standard for granting certiorari by Rule 10 of this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS WHETHER A DISHONORED CHECK IS A "DEBT" AS DEFINED BY THE FDCPA.

This Court has long reserved its discretionary grant of certiorari to the most compelling matters presented to it. *Layne v. Bowler Corp.*, 261 U.S. 387, 393 (1923) (grant of certiorari should be limited to cases where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.") This principle is now codified in Rule 10 of this Court, which, as applicable here, requires at a minimum that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The Seventh and Ninth Circuits are the only Courts of Appeals which have addressed the dishonored check question decided below and have reached precisely the same conclusion.

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. regulates the conduct of "debt collectors" in collecting "debts" owed or allegedly owed by consumers. The FDCPA broadly prohibits unfair or unconscionable collection methods in connection with the collection of a debt. Since the FDCPA only regulates "debt" collection, the Act's definition of "debt" serves to limit the scope of the FDCPA. The Act defines "debt" as:

> *any obligation* or alleged obligation of a consumer *to pay money arising out of a transaction* in which the money, property, insurance or services which are the subject of the transaction are primarily for personal,

> family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (emphasis added).

The first case to address whether a dishonored check is such a "debt" was *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997). The appellant argued that the FDCPA was inapplicable because the transaction did not involve an offer or extension of credit. The court began its analysis by noting that the case turned on whether the payment obligation that arises from a dishonored check constituted a "debt" under the FDCPA. It then referred to the Act's definition of "debt" and determined that there was no language that mentioned or required that the debt arise from an extension of credit. *Id.* at 1325. In addition, it rejected appellant's argument that the word "transaction," as used in the definition of "debt," be read restrictively to be a "credit transaction." *Id.* Although the court did not find it necessary to refer to extrinsic sources, the court conducted a thorough analysis of the FDCPA's legislative history and determined that it "reinforce[d] a finding that non-credit transactions are included in the Act's purview." *Id.* at 1327. Therefore, the Seventh Circuit concluded that the FDCPA's definition of "debt" did not require the offer or extension of credit and held that a dishonored check is a "debt" under the FDCPA. *Id.* at 1329.

After the Seventh Circuit decided *Bass*, the Ninth Circuit was called upon to address the very same issue. In the present case, *Charles v. Lundgren & Associates*, 119 F.3d 739 (9th Cir. 1997), the Ninth Circuit referred to the Seventh Circuit's opinion with approval, and adopted the reasoning of *Bass*. *Id.* at 742. Similarly, in

Brown v. Budget Rent-a-Car Systems, Inc., 119 F.3d 922 (11th Cir. 1997), the Eleventh Circuit, in a case not involving a dishonored check, referred to the *Bass* decision with approval and held that the extension of credit was not a prerequisite to the existence of a debt covered by the FDCPA. *Id.* at 924.

CheckRite has referred this Court to one case, *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987), that it contends "holds" that the FDCPA does not apply to non-credit transactions. *Zimmerman* did not address the dishonored check question decided in *Bass* and *Charles*. In *Zimmerman*, defendants were attempting to prevent persons from illegally pirating television signals. In order to stop the practice, defendants sent letters to 5,600 individuals suspected of intercepting HBO programming without a subscription. The letters threatened litigation if the recipients did not agree to pay a $300 non-negotiable "settlement" figure. The court phrased the issue as "whether the defendant cable television companies, in demanding monetary compensation in settlement of asserted legal claims against persons whom the defendants accused of having illegally received microwave television signals, were seeking to collect a 'debt' within the meaning of the Fair Debt Collection Practices Act." *Id.* at 1164.

The court focused on the term "transaction" in the FDCPA definition of "debt" and concluded that pirating television signal did not constitute a transaction. *Id.* at 1167-68. The key element in the *Zimmerman* court's conclusion was the lack of any sort of consensual transaction by the parties involved—theft normally does not involve a "transaction" between the thief and the victim. After deciding the issue of the case, the court stated in *dicta*:

> We find that the type of transaction which may give rise to a "debt" as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.

Id. at 1168-69. It is this language on which CheckRite hangs its argument. Specifically, CheckRite argues that this "holding" in *Zimmerman* creates a conflict among the circuits. However, its argument must fail.

The *Zimmerman* court was not asked to address whether a "debt" under the FDCPA required an offer or extension of credit. Rather, it was asked to consider whether the illegal interception of a signal involved a "transaction" as required under the Act's definition of "debt." It was only after concluding that the FDCPA did not apply because there was no consensual transaction that the court stated in *dicta* that a "debt" required the offer or extension of credit.

Since the *Zimmerman* court's statement was *dicta*, the Eleventh Circuit in *Brown* refused to follow the language that CheckRite now claims is the *Zimmerman* court's holding. *Brown*, 119 F.3d at 924, n. 1 (refusing to follow *Zimmerman* because it considered "the *Zimmerman* court's commentary on the credit-based nature of debt to be *dicta*."). In addition, the Seventh Circuit in *Bass* also refused to follow *Zimmerman* because it concluded that "the true basis for [the] decision in *Zimmerman* was the lack of any sort of consensual transaction." *Bass*, 111 F.3d at 1326. *Zimmerman* does not stand for the proposi-

tion that the term "debt" is to be defined in any manner different from that set forth in the FDCPA. Since the language CheckRite relies on is pure *dicta*, the Third Circuit is not in conflict with the other circuits. Therefore, its petition for writ of certiorari must be denied.

II.

THE NINTH CIRCUIT CORRECTLY DECIDED TO ADOPT THE *BASS* DECISION.

In the present case, the Ninth Circuit was faced with the issue of whether a dishonored check was an FDCPA "debt." Since the *Bass* court conducted a thorough analysis of the same issue, the Ninth Circuit refused to "replow plowed ground" and correctly decided to adopt the *Bass* decision. *Charles*, 119 F.3d at 742.

In *Bass*, the Seventh Circuit responded to the same arguments presented by CheckRite in the lower court. Like CheckRite, the appellants in *Bass* argued that an FDCPA "debt" required the offer or extension of credit. The *Bass* court responded to this argument by referring to the text of the FDCPA and its definition of "debt." The court concluded that nothing in the Act's definition of debt mentioned or required that the debt arise from an extension of credit. *Bass*, 111 F.3d at 1325. In addition, the court rejected the appellant's invitation to read the term "transaction" restrictively as a "credit transaction" because "the ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment." *Id.* at 1325.

Like CheckRite, the *Bass* appellants also argued that the legislative history of the FDCPA suggested that only

transactions involving the extension of credit were governed by the Act. However, the court determined that a review of the legislative history supported its holding. The *Bass* court noted that earlier versions of the Act included a credit extension requirement, and that this language was deleted from later drafts. *Id.* at 1327. In addition, the court reviewed the House and Senate hearings which revealed that several debaters acknowledged the applicability of the Act to dishonored checks. *Id.* at 1327 (citing Hearings Before the Subcommittee on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs on H.R. 29, 95th Cong., 1st Sess. at 257-61 (1977). The court concluded "[i]n short, Congress was aware of discord on whether 'debt' should be defined restrictively to include only credit transactions, but rejected this restriction in the text it adopted." *Id.* at 1327. Lastly, the court pointed to "an unequivocal statement of the drafters' intent on this issue: '[T]he committee intends that the term "debt" include consumer obligations paid by check or other non-credit consumer obligations.'" *Id.* at 1327 (quoting H.R.Rep. No. 95-131, 95th Cong., 1st Sess. 4 (March 29, 1977)).

In the lower court, CheckRite unsuccessfully argued that the placement of the FDCPA as a subset of the Consumer Credit Protection Act ("CCPA") was determinative in finding that the FDCPA only applied to credit transactions. The *Bass* court also considered this argument and determined that "the Act's codification as an amendment to the CCPA is at best a weak tool in the search for Congressional intent" and that it was "insufficient to outweigh the contrary intent evidenced by the Act's legislative history." *Id.* at 1328. More importantly, the court noted that the appellant's arguments were

refuted by the "enlargement of the CCPA to include consumer protections in other financial arenas" involving neither credit nor consumers.[1] *Id.* at 1328. In addition, the *Bass* court refused to refer to the CCPA's purpose or definitions provisions because "[t]he FDCPA is a self-contained, functionally complete act housing its own purpose, prohibitions, definitions, enforcement procedures, and remedies. The FDCPA requires no cross reference to other titles or subchapters of the CCPA, nor is such cross reference necessary to either understand or apply the Act's provisions." *Id.* at 1329.

CheckRite raises one argument in its petition that the *Bass* court was not asked to consider. The *Bass* court concluded that the term "transaction" did not require an offer or extension of credit. CheckRite now argues that the *Bass* court failed to recognize that a *consensual* transaction requires both parties to agree that "one will owe the other money when the exchange is concluded." (Pet. 10). CheckRite essentially argues that the word "consensual" requires an offer or extension of credit. However, its attempt to once again restrict the statutory definition must fail.

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[1] The Consumer Credit Protection Act ("CCPA") is comprised of nine titles, some of which have no application to credit. For example, the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* ("EFTA"), is part of the CCPA. The EFTA, however, does not apply to credit transactions; it applies to transactions in which *cash* is transferred through electronic means. See §§ 1692a(1), (2), (6) and (7). Title III of the CCPA, 15 U.S.C. §§ 1671-1677 provides for restrictions on garnishment indexed to the federal minimum wage. A credit transaction is not necessary to trigger its applicability. The Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, another provision of the CCPA, pertains to leases.

A "consensual transaction" does not require credit to be involved. It only requires that the parties knowingly and willingly negotiated or agreed for the exchange of goods and services. The definition CheckRite proposes would render a voluntary exchange of goods or services to be a non-consensual transaction merely because it does not involve credit. This completely defies logic. The term "consensual" should be given its ordinary meaning which is "in law, formed or existing by mere mutual consent." *Webster's New Universal Unabridged Dictionary* at 388 (2nd Ed. 1983). In common understanding, the purchase of goods with a check is a "transaction."

Moreover, a merchant who accepts payment by check understands that there is some risk of nonpayment. Even if the purchaser thinks that funds will be available when the check is presented, that belief may be erroneous. Checks bounce because of arithmetical errors, because incoming funds do not clear, and because checking accounts are subject to setoff and legal process. That is why the Uniform Commercial Code clarifies a check as a *conditional* payment. Uniform Commercial Code § 3-408 ("A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it."). That is also why companies like CheckRite exist. In a very real sense, when a merchant takes a check, the customer still owes the merchant money.

CheckRite refers to *Zimmerman*, 834 F.2d at 1163, and *Shorts v. Palmer*, 155 F.R.D. 172, 175-76 (S.D. Ohio 1994) to support its argument that a "consensual transaction" requires an offer or extension of credit. In both cases, the courts held that even though an obligation to

pay for the pirated cabled television signal and shoplifted merchandise existed, it was not an FDCPA debt because there was no underlying "transaction." CheckRite argues that these cases stand for the proposition that an obligee must have agreed to extend credit for there to be an FDCPA debt. However, CheckRite completely misconstrues the cases. The courts in *Zimmerman* and *Shorts* held that there was no FDCPA debt because the parties never negotiated or contracted for the exchange of goods or services, not because the obligee never agreed to extend credit.

The Seventh Circuit conducted a sound and complete analysis of the same arguments presented in the instant case. The Ninth Circuit was correct in its decision to adopt the *Bass* opinion. Therefore, this Court should deny CheckRite's petition for writ of certiorari.

III.

ALLOWING THE SEVENTH AND NINTH CIRCUIT DECISIONS TO STAND WILL NOT HAVE THE UNINTENDED EFFECT OF PREEMPTING STATE BAD CHECK STATUTES.

CheckRite claims that allowing the Seventh and Ninth Circuit decisions to stand will have the unintended effect of preempting state statutes governing dishonored checks. (Pet. 12-13). It also argues that if Congress had intended to preempt state bad check laws, it would have expressly done so. The fact is, Congress did expressly provide for preemption of state laws. The FDCPA contains a provision providing that it "does not annul, alter, or affect, or exempt any person subject to the provision of this subchapter from comply with the laws of any

State with respect to debt collection practices, *except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.*" 15 U.S.C. § 1692n (emphasis added). Therefore, CheckRite's argument is moot.

In addition, CheckRite overly exaggerates the FDCPA's preemptive effect. Section 1692n narrowly provides for preemption "to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency." Requiring debt collectors to comply with the dictates of the FDCPA would not preempt state statutes governing, for example, the imposition of criminal liability for writing bad checks. Demanding that debt collectors such as CheckRite comply with the requirements of the FDCPA would not hinder in any way the prosecution of persons for writing bad checks. Moreover, it is readily possible to comply with both the FDCPA and statutes such as Arizona Revised Statutes § 12-761.

Since Congress expressly provided for preemption, and the FDCPA's preemptive effect is very narrow, CheckRite's petition for writ of certiorari must be denied.

CONCLUSION

The circuit courts have unanimously held that a dishonored check is a "debt" as defined and that an FDCPA debt does not require the offer or extension of credit. CheckRite's attempt to create an apparent "conflict" among the circuits must fail because it relies on pure *dicta*. The Seventh Circuit was correct in holding that an FDCPA debt does not require the extension of credit. Moreover, the Ninth Circuit correctly decided to adopt

the sound and thorough analysis of the Seventh Circuit. Lastly, the decisions of the these circuits will not have the unintended effect of preempting state bad check statutes. Accordingly, CheckRite's petition for writ of certiorari must be denied.

Respectfully submitted,

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